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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Federal Communications Commission

WASHINGTON, D.C. 20554

In re
LISTENERS' GUILD, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

GAF BROADCASTING COMPANY, INC.,
Intervenor.

93-54
Case No. 92-1270

In re
LISTENERS' GUILD, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

GAF BROADCASTING COMPANY, INC.,
Intervenor.

Consolidated Case Nos. 93-1618
93-1687

In re
GAF BROADCASTING COMPANY, INC.,

For Renewal of License of Station WAXQ(FM),
Formerly WNCN(FM), New York, NY

File No. BRH-910201WL

MM Docket No. 93-54

To: The Commission

**JOINT REQUEST FOR APPROVAL OF AGREEMENT FOR DISMISSAL
OF COURT APPEALS AND PLEADINGS BEFORE THE COMMISSION**

Listeners' Guild, Inc. (the "Guild") and GAF Broadcasting Company, Inc. ("GAF"),
the licensee of WAXQ(FM) (formerly WNCN), New York, New York, by ~~the undersigned~~ 0414
List ABCDE

and pursuant to Section 73.3588 of the FCC rules, respectfully request that the Commission approve the attached Settlement Agreement between them with respect to the above-captioned matters.

Pursuant to this Settlement Agreement, the Guild seeks voluntary dismissal of all of the following: (1) its pending appeal before the U.S. Court of Appeals For The D.C. Circuit in Case No. 92-1270, stemming from its Petition To Deny the 1988 applications for the transfer of control of GAF (File Nos. BTCH-880322GF, BTCH-880322GG); (2) its pending appeal before the D.C. Circuit in Consolidated Case Nos. 93-1618 and 93-1687, stemming from its Petition To Deny the 1991 application for renewal of WAXQ (File No. BRH-910201WL, MM Docket No. 93-54); (3) its December 23, 1993 Application For Review and October 27, 1993 Application for Review, both pending before the Commission, of various orders by the Review Board and Administrative Law Judge in MM Docket No. 93-54; and (4) all of its pleadings, comments and other filings pending before the Commission (including the EEO Branch) with respect to WAXQ's EEO record, responses to the FCC staff, and other filings, in connection with any remaining issues pending before the Commission stemming from the Guild's 1991 Petition to Deny WAXQ's renewal. The Guild and GAF, with the concurrence of the Commission, will request the Court to remand the record in Case Nos. 92-1270, 93-1618 and 93-1687 to allow the Commission to rule upon the proposed settlement. The Guild has also agreed to require that neither it nor its Officers or Executive Committee members will file, join, cooperate with or instigate any third party to file an application for the WAXQ frequency which might be filed through June 1, 1998, or prior to

the expiration of WAXQ's current license term, whichever is longer, consistent with the Commission's decision in Intercontinental Radio Inc., 62 RR 2d 1565 (1985).

In return for the dismissal of all of its pleadings and appeals, the Guild would be reimbursed the sum of \$110,000, or such lesser amount as may be approved by the Commission, which the Guild represents does not exceed its legitimate and prudent expenses in connection with the preparation, filing and prosecution of its petitions to deny and all related proceedings and appeals to date. Attached hereto are declarations from the parties to this effect filed pursuant to 47 C.F.R. Sec. 73.3588.

On September 17, 1993, an Administrative Law Judge granted GAF's renewal application conditioned upon the outcome of the EEO Branch's review of WAXQ's EEO record. Memorandum Opinion and Order, FCC 93M-593, ALJ Chachkin, released 9/17/93. On February 18, 1994 the Guild filed with the EEO Branch comments on GAF's "Response to Staff Inquiry," which had been filed by GAF on January 18, 1994 in response to a December 3, 1993 letter of inquiry from the Chief, EEO Branch (Ref. No. 1800C2). In its comments, the Guild argued that GAF's submissions to the EEO Branch raised questions requiring resolution at a hearing with respect to whether GAF was guilty of misrepresentation or lack of candor in connection with its earlier submissions relating to its EEO program and performance. Subsequently, on March 3, 1994, GAF filed an extensive reply to all matters raised in the Guild's comments, offering a detailed explanation of the underlying events and circumstances.

In light of GAF's response to the Guild's EEO-related allegations, and based on the information available to it, the Guild is not aware of any evidence that GAF has engaged in

discrimination in its employment practices or in any misrepresentation or lack of candor in connection with its EEO submissions to the Commission, and is satisfied that there exists no substantial and material issue of fact that would require a hearing with respect thereto. For those reasons, and in light of the clear benefits that the present settlement would provide - to the parties, to the Commission and to the public interest - by bringing to an amicable close many years of litigation which has continued to consume substantial resources of all concerned, the Guild now is willing to withdraw its request for a hearing regarding GAF's EEO-related activities and submissions, and instead to seek approval of the present settlement. Upon such approval, the Guild would interpose no further objections to the renewal of GAF's license without a hearing, and thus it joins in the request therefor.

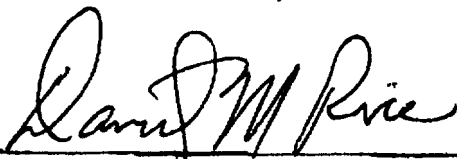
Approval of this Settlement Agreement would clearly serve the public interest. This Agreement will end longstanding litigation brought by the Guild against GAF before the Commission and Court of Appeals with respect to several applications, and thus conserve the time and resources of the Commission, the Court, and the parties. The Guild will not receive more than its legitimate and prudent expenses. Finally, this settlement will allow for an expedited final grant of GAF's renewal application.

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WHEREFORE, In light of the foregoing, GAF and the Guild respectfully request that the Commission (1) approve this Settlement Agreement; (2) dismiss all pending appeals, comments and other pleadings filed by the Guild with respect to WAXQ now pending before the Commission or its EEO Branch; and (3) grant final approval to the renewal of WAXQ.

Respectfully submitted,

LISTENERS' GUILD, INC.


David M. Rice*

Its Attorney

One Old Country Road
Suite 410
Carle Place, NY 11514

GAF BROADCASTING COMPANY,
INC.

Aaron I. Fleischman
Arthur H. Harding
Christopher G. Wood

Its Attorneys

Fleischman and Walsh
1400 Sixteenth St., N.W.
Suite 600
Washington, D.C. 20036

DATED: March 29, 1994

14396

*Original signature to be submitted upon receipt.

WHEREFORE, In light of the foregoing, GAF and the Guild respectfully request that the Commission (1) approve this Settlement Agreement; (2) dismiss all pending appeals, comments and other pleadings filed by the Guild with respect to WAXQ now pending before the Commission or its EEO Branch; and (3) grant final approval to the renewal of WAXQ.

Respectfully submitted,

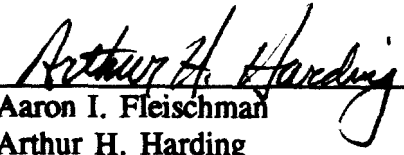
LISTENERS' GUILD, INC.

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Aaron I. Fleischman
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Its Attorneys

Fleischman and Walsh
1400 Sixteenth St., N.W.
Suite 600
Washington, D.C. 20036

DATED: March 29, 1994

ATTACHMENT A**DECLARATION**

LEIGH N. HARRIS, under penalty of the laws of perjury, hereby declares as follows:

I am the Chairman of Listeners' Guild, Inc. ("Guild"), a not-for-profit corporation which has petitioned the Commission to deny applications for the transfer of control of GAF Broadcasting Company, Inc. ("GAF") and for the renewal of GAF's license for radio station WAXQ (FM), formerly WNCN (FM), New York, New York, and which has filed court appeals in both of said matters. Those appeals are now pending before the United States Court of Appeals for the District of Columbia Circuit, and aspects of GAF's renewal application are presently pending before the Commission.

The Guild has determined that it is in the interest of all the parties, as well as of the Court and the Commission, to resolve all of the pending proceedings in accordance with the Guild's written agreement with GAF ("Agreement"), which expresses the entire understanding between GAF and the Guild. As provided in the Agreement, the amount of consideration to be received by the Guild for dismissal of its court appeals and related pending petitions and objections is \$ 110,000. That is far less than half of the Guild's legitimate and prudent expenses of preparing, filing, and prosecuting said petitions and court appeals over a period of six years, as more fully set forth in the accompanying Declaration of the Guild's attorney, David M. Rice, Esq. No other

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consideration has been paid or promised to the Guild or to any officer,
director or principal thereof.

A handwritten signature in dark ink, appearing to read "Leigh N. Harris", written over a horizontal line.

Leigh N. Harris *
Chairman,
Listeners' Guild, Inc.

March 28, 1994

*Original signature to be submitted upon receipt.

ATTACHMENT TO HARRIS DECLARATION**DECLARATION**

DAVID M. RICE, under penalty of the laws of perjury, hereby declares as follows:

I am the attorney for Listeners' Guild, Inc. ("Guild"), and have represented the Guild for the last six years in connection with its Petitions to Deny applications for the transfer of control of GAF Broadcasting Company, Inc. ("GAF") and for the renewal of GAF's license for radio station WAXQ (FM), formerly WNCN (FM), New York, New York, as well as in court appeals in both of said matters.

During my six-year representation of the Guild I have provided legal services of \$ 279,725.00 at my customary rates in the preparation, filing and prosecution of the above-mentioned petitions and court appeals. Those services include: 319.0 hours during the period from March 1988 through December 1990 at my customary hourly rate of \$ 225.00, aggregating \$ 71,775.00; and 831.8 hours during the period from January 1991 through the present at my customary hourly rate of \$ 250.00, aggregating \$ 207,950.00; for a total of \$ 279,725.00 (exclusive of direct, out-of-pocket expenses incurred for court filing fees, copying, postage and express charges, long distance telephone charges and travel expenses in connection with said matters in excess of \$ 5,000).

The legal services I have rendered in the transfer of control proceeding include: preparation and filing of the Guild's *Petition to Deny* the applications

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for transfer of control of GAF, including review and analysis of the agreements and other documents annexed to said applications and legal research with respect thereto; review of GAF's *Opposition* and preparation and filing of a *Reply* thereto; preparation of response to GAF's request to Chairman Patrick for expedition, including review of factual matters and legal research; review of amendments to GAF's applications; preparation and filing of a *Petition for Reconsideration* of the decision of the Chief, Mass Media Bureau, granting the applications; review of GAF's *Opposition* and preparation and filing of a *Reply* thereto, including review of GAF's proxy statement/prospectus regarding its proposed transaction and of other factual matters as well as legal research; preparation and filing of a *Supplement to Petition for Reconsideration*, and an accompanying *Motion for Leave to File* the same and an *Emergency Request for Stay*; review of GAF's *Opposition* to said pleadings and preparation and filing of a *Reply* thereto; review of amendment to applications and of factual matters as well as legal research relating to the conviction of GAF's parent company in *U.S. v. GAF Corp.* (S.D.N.Y. 1989) and relating to the settlement decree in *SEC v. GAF Corp.* (D.D.C. 1990); review of *Supplement* filed by GAF regarding the effect of said conviction; participation in, and counseling in relation to, ongoing discussions regarding possible settlement; review of *Petition to Require Filing of Early Renewal Application*, filed by Class Entertainment & Communications, L.P. ("Class"); review of GAF letter to Chairman Sikes requesting expedition and Class response thereto; review of GAF's *Opposition* and Class' *Reply* thereto; Review of inquiry to GAF from the Chief, Mass Media Bureau, of GAF's *Response* thereto, and of Class' *Reply* to GAF's

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Response; preparation and filing of a *Reply* to said *GAF Response*; review of further amendments to applications relating to the reversal of the conviction of GAF's parent in *U.S. v. GAF Corp.* (2d Cir. 1991), the Government's *Petition for Rehearing and Suggestion for Rehearing En Banc* therein, the denial of said *Petition* and the subsequent dismissal of the indictment, and analysis and legal research with respect thereto; review and analysis of the Commission's *Memorandum Opinion and Order* denying reconsideration; preparation and filing of a *Notice of Appeal* to the D.C. Circuit in Case No. 92-1270; preparation of a *Notice of Intention to Intervene* in Case No. 92-1269 commenced by Class for review of the same Commission orders; preparation and filing of various procedural documents before the Court of Appeals in Case Nos. 92-1269 and 92-1270; participation in extensive discussions regarding possible settlement of Case No. 92-1270; review of settlement between GAF and Class of Case No. 92-1269; preparation and filing of *Brief for Appellant*, including extensive legal research and analysis; review and analysis of *Brief for Appellee* and *Brief for Intervenor*; preparation and filing of *Reply Brief*, including extensive legal research and analysis; preparation and filing of *Supplemental Brief*, including legal research and analysis; preparation for and participation in oral argument of appeal; preparation and submission of *Further Supplemental Brief* and accompanying motion; and participation in extensive discussions culminating in the present settlement.

The legal services I have rendered in the license renewal proceeding include: preparation and filing of the Guild's *Petition to Deny* GAF's renewal application, including review of GAF's renewal application and materials regarding its public affairs programming and employment practices, review of

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factual matters and legal research; review of competing application filed by Class Entertainment & Communications, L.P. ("Class"); review of competing application filed by Fidelio Group, Inc. ("Fidelio"); review of *Petition to Deny* filed by Class; review of *Petition to Deny* filed by NAACP et al.; review of *Petition to Deny* Fidelio application filed by GAF and of Fidelio's *Opposition* and GAF's *Reply* in connection therewith; review of various other amendments, motions and pleadings relating to the GAF, Fidelio and Class applications; review of GAF's *Consolidated Opposition* to the Guild, Class and NAACP *Petitions to Deny*; preparation and filing of a *Reply* to said *Consolidated Opposition*, including review of factual matters and legal research; review of Class' *Reply* to said *Consolidated Opposition*; review of proposed settlement between GAF and NAACP and Class' and Fidelio's *Comments* thereon; preparation and filing of a response to said proposed settlement; review of GAF's *Amendment to Consolidated Opposition*; review of the Commission's *Hearing Designation Order*; preparation and filing of a *Petition for Reconsideration of the Hearing Designation Order*; review of GAF's *Opposition* thereto and preparation and filing of a *Reply* thereto; preparation and filing of a *Notice of Appeal* (Case No. 93-1618) and a *Petition for Review* (Case No. 93-1687) in the D.C. Circuit from the *Hearing Designation Order* and the denial of said *Petition for Reconsideration*; preparation and filing of various procedural documents in said D.C. Circuit proceedings; preparation and filing of a *Petition for Intervention* in the comparative hearing designated by the *Hearing Designation Order*; preparation and filing of a *Motion to Enlarge Issues* in the comparative hearing proceeding; review of GAF's and the Mass Media Bureau's

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Oppositions to said Petition for Intervention and Motion to Enlarge Issues and preparation and filing of consolidated Replies thereto; preparation of various procedural motions and requests in said comparative hearing proceeding; review of decision of Administrative Law Judge ("ALJ") on the Guild's Petition for Intervention and Motion to Enlarge Issues and preparation and filing of an Appeal therefrom before the Review Board; review of GAF's Opposition and MMB's Comments on said Appeal; review of decision of Review Board denying Appeal; preparation and filing of an Application for Review of such denial; review of the ALJ's decision renewing GAF's license and preparation of a Notice of Appeal and an Appeal therefrom to the Review Board; review of decision of Review Board denying Appeal; preparation and filing of an Application for Review of such denial; review of EEO Branch inquiry to GAF and of GAF's Response to same; preparation and filing of Comments on GAF's Response; participation at various times in extensive discussions regarding settlement, ultimately culminating in the present settlement.



David M. Rice *

March 28, 1994

*Original signature to be submitted upon receipt.

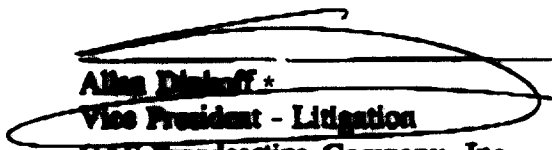
DECLARATION

I, Allan Dinkoff, hereby declare and state as follows under penalty of perjury:

I am Vice President - Litigation of GAF Broadcasting Company, Inc. ("GAF"), the licensee of WAXQ(FM), formerly WNCN(FM), New York, New York.

GAF has entered into a Settlement Agreement dated March 28, 1994 with the Listeners' Guild, Inc. ("Guild"), concerning appeals now pending before the U.S. Court of Appeals For the District of Columbia Circuit and pleadings and appeals filed by the Guild at the Federal Communications Commission.

Neither GAF, nor its parent companies, nor any principal thereof has promised or paid any consideration to the Guild, its officers, or its members, other than as described in the Settlement Agreement, for the dismissal of the Guild's appeals and pleadings. Based on the declarations of the Guild's Chairman and attorney, GAF understands that the agreed upon consideration represents an amount equal to or less than the Guild's reasonable and prudent expenses in preparing and prosecuting the pleadings and appeal which are encompassed by the Settlement Agreement.


Allan Dinkoff *
Vice President - Litigation
GAF Broadcasting Company, Inc.

Dated: March 28, 1994

14457

*Original signature to be submitted upon receipt.

SETTLEMENT AGREEMENT

GAF Broadcasting Company, Inc. ("GAF") and Listeners' Guild, Inc. (the "Guild"), in order to settle and resolve all disputes and all pending administrative and judicial proceedings between them, including those relating to or arising out of applications to the FCC for authorization of the transfer of control of GAF (File Nos. BTCH-880322GF, BTCH-880322GG) and for renewal of its license for station WAXQ(FM), formerly WNCN(FM), New York, New York (hereinafter "WAXQ") (File No. BRH-910201WL); and for such other purposes as are expressly contained herein; do hereby agree on this 28th day of March, 1994 as follows:

1. **Effective Date of Agreement:** Except as otherwise specifically provided herein, the provisions, terms and conditions of this Agreement shall take effect upon the date that the FCC's approval hereof becomes final, *i.e.*, no longer subject to administrative or judicial reconsideration or review ("Final").
2. **Reimbursement of the Guild's Expenses:** GAF shall, within ten (10) days following the date that the FCC's approval hereof becomes Final, and upon satisfaction by the Guild of its obligation to provide written agreements from such of those persons described in the first sentence of paragraph nine of this Agreement as is required by the provisions of said paragraph nine, pay the Guild the sum of One Hundred Ten Thousand Dollars (\$110,000) or such lesser amount as may be approved by the FCC. The Guild represents and warrants that the total amount to be paid to the Guild hereunder does not exceed its legitimate and prudent expenses in connection with the preparation, filing and prosecution of the Guild's petitions to deny the applications for authorization of the transfer of control of GAF and for renewal of the license for WNCN/WAXQ and all related proceedings and appeals, through the date of this Agreement to the extent approved by the FCC.
3. **FCC Approval:** This Agreement is subject to the approval of the FCC. No later than five (5) business days following the execution hereof, the parties shall jointly file with the FCC a request for approval hereof, with appropriate supporting documentation in full compliance with the FCC's Rules. Immediately following execution of this Agreement, the parties shall sign consent motions for remand to the FCC of the record in D.C. Circuit Case Nos.

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92-1270, 93-1618 and 93-1687. These executed consent motions shall promptly be presented to the FCC for signature, and shall be duly filed with the D.C. Circuit upon receipt of same. All documents to be filed pursuant to this paragraph three shall be prepared for filing, in a form acceptable to GAF and the Guild, prior to the execution of this Agreement. The parties shall use their best efforts and shall cooperate fully to secure FCC approval of this settlement and to secure court approvals of the motions for remand of the record, and shall promptly provide such other information as the Commission may require, and shall take such other steps as may reasonably be needed to obtain approval of this Agreement in a timely manner. In the event that this settlement is not approved by the FCC within one hundred twenty (120) days from the date hereof, either party shall have the right, upon thirty (30) days' prior written notice to the other, to annul this settlement, whereupon it shall be of no further force or effect (unless it shall have been approved by the FCC during such thirty-day period), and the Guild shall have the right to seek to resume the prosecution of its petitions and appeals before the FCC and the Court of Appeals for the D.C. Circuit.

4. **Dismissal of Petitions and Appeals:** Effective upon Final approval of this settlement by the FCC, the Guild's pending petitions to deny (and other requests for FCC action in connection therewith) and the Guild's pending appeals before the D.C. Circuit shall be deemed withdrawn and dismissed with prejudice.
5. **Resolution of Dispute Regarding Name Similarity:** The parties hereby waive and forever release and discharge one another from any and all judicial or administrative claims relating to the similarity between the names of the Guild and the "WNCN Listeners' Club," including, but not limited to, claims relating to infringement of copyright, trademark, trade name or any torts related to such name similarity. The Guild acknowledges GAF's right to use the name "WNCN Listeners' Club" and GAF acknowledges the Guild's right to use the name "Listener's Guild."
6. **Confidentiality Agreement:** The Guild acknowledges and reaffirms the validity of that certain "confidentiality agreement" entered into between GAF and the Guild dated July 13, 1990. GAF waives and forever releases and discharges the Guild from any and all claims GAF may have regarding any

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breach of said confidentiality agreement which may have occurred prior to the date of this Agreement. GAF reserves its right to enforce any future breaches of said agreement which may occur after the date of this Agreement. The Guild waives and forever releases and discharges GAF from any and all claims the Guild may have regarding its allegation that there were attempts to "coerce" or otherwise induce the Guild to waive its rights to the protections of the FCC *ex parte* rules.

7. **WNCN Listeners' Club Mailing List:** (a) GAF hereby grants the Guild a limited license for the use of the approximately 12,000 names and addresses contained on the mailing list of members of the WNCN Listeners' Club (the "List"). GAF shall provide the Guild with copies of said List, both in computer data form and in printed "hard copy" form, not later than the date GAF is required to reimburse the Guild for its expenses, as set forth in paragraph two of this Agreement. The Guild represents and warrants that it will not disclose the names and addresses on the List to any third party. Such limited license shall allow the Guild to make a maximum of two mailings to each person on the List per twelve-month period during the twenty-four month period commencing on the date said List is provided to the Guild, and the license for use of the List shall expire at the end of said twenty-four month period. Within thirty (30) days after the expiration of said twenty-four month period, any copies of such List in the Guild's possession, in whatever form, shall be returned to GAF.

(b) Notwithstanding the provisions of subparagraph (a) of this paragraph seven, the Guild shall not be subject to any limitations or restrictions regarding the number, time or frequency of communications to, or the disclosure of the name and address of, any person from whom the Guild receives a reply, or who was already on the Guild's own membership or mailing list prior to the Guild's receipt of the WNCN Listeners' Club List.

(c) The Guild agrees that, during the period in which the limited license granted by subparagraph (a) of this paragraph seven is in effect, it shall not in any mailings to persons on the List or on the Guild's own membership or mailing list, or in any other mass mailings, advertisements, publications or written communications directed to the general public or any substantial segment thereof, attack the honesty, character or integrity of GAF, its officers,

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directors, subsidiaries or affiliates, either by name or by description, or instigate or seek funding to support any actions that would contravene the provisions of this Agreement. GAF agrees that during such period it shall not in any mailings to persons on the List or in any other mass mailings, advertisements, publications or written communications directed to the general public or any substantial segment thereof, attack the honesty, character or integrity of the Guild, its officers or directors, either by name or by description, or instigate or seek support of any actions that would contravene the provisions of this Agreement.

(d) The Guild shall not be required to obtain GAF's prior consent to or approval of the content of any mailing, advertisement, publication or written communication, whether or not directed to persons on the List or on the Guild's own membership or mailing list or to the general public or any substantial segment thereof. If, however, the Guild voluntarily elects to submit in writing to GAF, directed to the attention of GAF's General Counsel (with a copy as provided in paragraph eighteen hereof), any text which it wishes to include, or which it may thereafter wish to include in one or more communications covered by the provisions of subparagraph (c) of this paragraph seven ("Text"), the parties shall comply with and be subject to the following procedures, terms and conditions:

(i) The Guild may avail itself of the opportunity to submit Text to GAF on as many occasions as it may wish.

(ii) GAF shall be barred from asserting any claim or contention before any tribunal whatsoever, including, without limitation, in any arbitration under this Agreement, whether pursuant to paragraph seventeen hereof or otherwise, that the use of such Text in any subsequent mailing, advertisement, publication or other written communication violates the provisions of subparagraph (c) of this paragraph seven, unless GAF, not later than the end of the second full business day after receipt of such Text from the Guild, provides the Guild (with a copy as provided in paragraph eighteen hereof) with written notice of GAF's objections thereto, specifying in detail the particular portion or portions of the Text to which it objects, and the

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basis and grounds upon which GAF contends that said portion or portions of the Text would be violative of said provisions.

(iii) If GAF and the Guild are unable to reach agreement with respect to whether any portion or portions of the Text would violate the provisions of subparagraph (c) of this paragraph seven, the Guild may elect to submit the dispute to expedited arbitration to a single arbitrator, chosen as provided in subparagraph (d) (iv) below (the "Pre-Clearance Arbitrator"), who shall decide such dispute as expeditiously as possible, and if possible within two (2) business days. Said decision shall be made by the Pre-Clearance Arbitrator on the basis of the Guild's submission of the Text to GAF, GAF's written objections thereto, and a reply by the Guild which shall not exceed in length the greater of two pages or the length of GAF's objections. The Pre-Clearance Arbitrator shall have complete discretion to determine how any compensation to which he is entitled for his services shall be borne by the parties. The findings of the Pre-Clearance Arbitrator shall be final and binding upon the parties.

(iv) GAF and the Guild hereby designate and appoint Dean John Sexton of the New York University School of Law as the exclusive Pre-Clearance Arbitrator of any dispute arising under this subparagraph (d). In the event that Dean Sexton is, or becomes, unwilling or unable to serve, the parties shall act in good faith to agree upon another suitable person to act as such exclusive Pre-Clearance Arbitrator. The parties also shall act in good faith promptly after the execution of this Agreement to agree upon an alternate Pre-Clearance Arbitrator to whom either party may elect to submit any dispute arising under this subparagraph (d) if, at the time such dispute is submitted to arbitration, Dean Sexton (or his successor) is unavailable to resolve such dispute and will continue to be unavailable for at least one week thereafter.

(v) Any Text for which the Guild has sought prior approval from GAF and to which GAF has not objected as provided above or which the Pre-Clearance Arbitrator has determined not to be violative of the provisions of subparagraph (c) of this paragraph seven may be used by the Guild in any mailings, advertisements, publications or other

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written communications, free of any claim or contention by GAF before any tribunal whatsoever, including, without limitation, any arbitration under this Agreement, whether pursuant to paragraph seventeen hereof or otherwise, that such use violates this Agreement or entitles GAF to any relief whatsoever against the Guild. Without limiting the Guild's potential liability for a breach of subparagraph (c) of this paragraph seven in the event it does not elect to submit to GAF for approval any Text used in any relevant mailings, advertisements, publications or written communications, the Guild shall be subject to liability for breach of said subparagraph (c) in the event that it makes use in any mailings to persons on the List or on the Guild's own membership or mailing list, or in any other mass mailings, advertisements, publications or written communications directed to the general public or any substantial segment thereof, of any Text which the Pre-Clearance Arbitrator has determined to be violative of the provisions of said subparagraph (c), or of any Text to which GAF has objected as provided above but which has not been submitted by the Guild to the Pre-Clearance Arbitrator.

8. **No Representations to FCC:** GAF and the Guild agree and acknowledge that none of the terms of this Agreement shall be considered to be representations to the FCC or to involve matters of regulatory concern to the FCC and that no dispute arising from any term herein shall be the basis for any petition, pleading or other submission to the FCC. This Agreement is enforceable only to the extent of a private contract through normal judicial channels or through arbitration as provided for herein.
9. **Competing Applications:** The Guild agrees that it will seek from each of the members of its Executive Committee and its officers holding such positions at any time during the period from March 1, 1994 through the date of the execution of this Agreement, a written agreement (in the form annexed hereto as Exhibit A) that he or she will not file, instigate, join or knowingly cooperate with any third party to file a competing application for the frequency occupied by WAXQ in New York City if such competing application is filed prior to June 1, 1998 (or prior to the expiration of WAXQ's current license term, whichever is longer) and is filed while he or she is, or within

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two years after he or she ceases to be, a member of the Executive Committee or an officer of the Guild. The Guild shall provide GAF with such written agreements from at least four such persons described above prior to GAF's obligation to reimburse the Guild in accordance with paragraph two of this Agreement. The Guild represents and warrants that as of March 1, 1994 and as of the date of the execution hereof, there were five (5) persons who were either Executive Committee members or officers of the Guild. The Guild also shall obtain a written agreement (in the form annexed hereto as Exhibit B) from each other person who becomes a member of its Executive Committee or becomes an officer of the Guild after the date of the execution of this Agreement and prior to June 1, 1998 (or prior to the expiration of WAXQ's current license term, whichever is longer), at the time such person assumes such office. The Guild shall provide GAF with a copy of each such agreement within ten (10) days following a written request therefor. GAF agrees that the Guild shall not be liable for any breach by any current or future member of the Executive Committee or officer from whom the Guild has obtained such a written agreement and delivered such agreement to GAF in accordance with this paragraph nine. The Guild further agrees that it will not itself file any such competing application, nor will it seek to intervene or otherwise file pleadings at the FCC in support of any competing application filed prior to June 1, 1998 (or prior to the expiration of WAXQ's current license term, whichever is longer) which may seek the frequency occupied by WAXQ, nor will it knowingly provide cooperation or assistance to any such competing applicant.

10. **Future Legal Representation:** The Guild agrees that, in the future, it will not employ David M. Rice, Esq., or any law firm with which he is affiliated, to represent the Guild in connection with the filing of any petitions, comments or other pleadings adverse to GAF or to station WAXQ in any adjudicatory proceeding at the FCC commenced prior to June 1, 1998 (or prior to the expiration of WAXQ's current license term, whichever is longer). Nothing herein shall be construed to limit the Guild's right to participate in any FCC proceeding or other action involving GAF or WAXQ, either *pro se* or through counsel, except to the extent that such participation would be contrary to the provisions of this Agreement. On his own account, David M. Rice agrees not to represent any party in any adjudicatory proceeding at the

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FCC covered by the terms of paragraphs nine or ten hereof commenced prior to June 1, 2005, nor knowingly to provide counsel or assistance to any such party or its attorneys.

11. **General Release and Covenant Not to Sue:** GAF and the Guild, their respective officers and directors, hereby mutually and forever release and discharge each other to the fullest extent permitted by law from all claims, causes of action, rights of petition to the FCC and any other method of legal redress, known and unknown, that have accrued or which arise from facts in existence or events which have occurred as of the date of this Agreement. In the event that either party commences a legal action or a proceeding in any administrative agency, including the FCC, which asserts a claim or right to relief against the other arising out of facts or events that took place prior to the date of this Agreement, the party who commenced the legal action or proceeding agrees to indemnify and hold harmless the respondent or defendant in such proceeding, including, without limitation, reimbursing to the respondent or defendant all attorneys' fees associated with the defense of such action or proceeding. Moreover, the parties agree that the injury from the breach of the aforementioned release and covenant not to sue is not fully recoverable in an action at law. Therefore, each party acknowledges that the other is entitled to equitable relief from a court of competent jurisdiction in the event of a breach of this provision by the other party. This general release and covenant not to sue shall not extend to any actions brought in a court of competent jurisdiction, or submitted to arbitration pursuant to paragraph seventeen hereof, for breach of this Agreement or to specifically enforce any of the terms of this Agreement. Anything to the contrary in this Agreement notwithstanding, neither party shall be liable to the other for liquidated or other damages, costs or expenses for any breach of this paragraph eleven unless such party shall have failed to dismiss or withdraw such action, or claim within thirty (30) days following receipt of notice from the other party to the effect that said action, proceeding or claim has been brought in contravention of the terms of this paragraph eleven.
12. **Liquidated Damages:** (a) The parties agree that the damages to GAF are not likely to be ascertainable with reasonable precision in the event of a breach by the Guild of any of the following provisions of this Agreement:

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- (i) A breach by the Guild of the last sentence of paragraph nine of this Agreement ("Competing Applications");
- (ii) Any actions of any Executive Committee member or officer of the Guild (including past, current and future Executive Committee members or officers to the extent provided in paragraph nine hereof) which would contravene the terms of the written agreements contemplated by paragraph nine of this Agreement, but only if the Guild has failed to provide GAF with a written agreement from such Executive Committee member or officer on a timely basis as provided in paragraph nine;
- (iii) A breach by the Guild of the first sentence of paragraph ten of this Agreement ("Future Legal Representation"); or
- (iv) The commencement by the Guild of any proceeding before an administrative agency in breach of paragraph eleven of this Agreement ("General Release and Covenant Not to Sue") which asserts a claim or right to relief against GAF arising out of facts or events that took place prior to the date of this Agreement, and which is not withdrawn within thirty (30) days after notice from GAF as provided in said paragraph eleven. (It is expressly understood and agreed that the liquidated damages provided for by this subparagraph (a) (iv) shall not apply to the commencement by the Guild of any judicial or arbitration proceeding.)

Therefore the parties agree that, in the event of such a breach by the Guild of any of said provisions of this Agreement (but not in the event of any other breach of this Agreement except to the extent expressly provided in subparagraph (b) of this paragraph twelve), and in addition to whatever other remedies are available in equity, the Guild shall pay to GAF, as liquidated damages, the entire amount of consideration paid under paragraph two of this Agreement, together with interest running from the time of such breach calculated at the rate provided by the law of the District of Columbia for unpaid judgments.

(b) The parties further agree that the damages to GAF are not likely to be ascertainable with reasonable precision in the event of a breach by the Guild of subparagraph (c) of paragraph seven of this Agreement ("WNCN Listeners' Club Mailing List"). Therefore the parties agree that, in the event of such a breach by the Guild of said provision of this Agreement, and in addition to whatever other remedies are available in equity, the Guild shall pay to GAF,

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as liquidated damages, the entire amount of consideration paid under paragraph two of this Agreement, together with interest running from the time of such breach calculated at the rate provided by the law of the District of Columbia for unpaid judgments. Notwithstanding the foregoing, and without limiting GAF's right to seek such damages as the arbitrators may award, the provisions of this subparagraph (b) shall not be applicable to any breach by the Guild which occurs after the earlier of (i) one year after FCC approval of this Agreement becomes Final, or (ii) the date of any communication by GAF which is determined to constitute a breach by GAF of the provisions of the last sentence of subparagraph (c) of paragraph seven of this Agreement.

(c) The parties further agree that the damages to the Guild from a breach by GAF of subparagraph (a) of paragraph seven of this Agreement ("WNCN Listeners' Club Mailing List") are not likely to be ascertainable with reasonable precision. Therefore the parties agree that, in the event of a breach by GAF of said subparagraph (a) of paragraph seven of this Agreement, and in addition to whatever other remedies are available in equity, GAF shall pay to the Guild, as liquidated damages, the sum of Five Thousand Dollars (\$5,000) for each month by which the provision of said List to the Guild is delayed beyond the date herein specified, up to a maximum of One Hundred Ten Thousand Dollars (\$110,000), together with interest running from the time of such breach calculated at the rate provided by the law of the District of Columbia for unpaid judgments.

13. **Specific Performance:** The parties agree that irreparable damage could occur in the event that any of the provisions of this Agreement were not performed in accordance with its specific terms or were otherwise breached. It is accordingly agreed that either party shall be entitled to an injunction or injunctions to prevent breaches of this Agreement and to enforce specifically the terms and provisions hereof in a state or federal court, this being in addition to any other remedy to which such party may be entitled at law or in equity and pursuant to paragraph twelve hereof.
14. **Joint Press Release:** GAF and the Guild shall issue a joint press release to announce the execution of this Agreement, the text of which release shall be approved by both parties prior to the execution hereof. Said release shall be

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the sole announcement to the press and other media of the execution hereof, and no representative of either party shall issue any comment to the press or other media upon this settlement or upon the proceedings settled hereby until sixty (60) days following the date upon which FCC approval of this settlement becomes Final.

15. **Organization and Authority:** The Guild represents and warrants that it is a corporation duly organized, validly existing and in good standing under the laws of the State of New York with full power to enter into this Agreement and to carry out the terms hereof. GAF represents and warrants that it is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware with full power to enter into this Agreement and to carry out the terms hereof. Prior to the execution of this Agreement, each party shall provide the other with an executed Board resolution or other satisfactory evidence that this Agreement would be binding upon it upon execution by the individual authorized by its Board to sign this Agreement.
16. **Governing Law and Jurisdiction:** This Agreement shall be governed by and interpreted under the laws of the State of New York without giving effect to the principles of conflicts of law thereof. Except to the extent that the parties have agreed to arbitrate any disputes pursuant to paragraphs seven (d) and seventeen hereof, GAF and the Guild irrevocably agree that all actions or proceedings in any way, manner or respect arising out of or from or related to this Agreement or any other agreement contemplated hereby shall be litigated in courts having situs within the State and County of New York. GAF and the Guild each hereby consents and submits to the jurisdiction of any local, state or federal court within said State and County in which jurisdiction is proper. GAF and the Guild each hereby waives any right it may have to transfer or change the venue of any litigation brought with respect to this Agreement to any court having situs outside the State and County of New York.
17. **Arbitration and Service:** Except as otherwise provided in subparagraph (d) of paragraph seven hereof, all disputes between the parties under, arising out of, or relating to this Agreement shall be submitted to arbitration in New York City before a panel of three arbitrators pursuant to the commercial arbitration rules and procedures of the American Arbitration Association. The award of the arbitrators shall be final and binding upon the parties and judgment on